RECORD AND BRIEFS

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Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

v.

SOLARCITY CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMERICAN PUBLIC POWER ASSOCIATION AND LARGE PUBLIC POWER COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. STATE-ACTION IMMUNITY IS CRITICAL TO PUBLIC POWER UTILITIES' ABILITY TO FOCUS ON THEIR PUBLIC OBJECTIVES 4

A. Public power utilities are governmental entities that serve a public purpose 5

B. Public power utilities provide a broad swath of public services 8

II. WAITING UNTIL THE END OF TRIAL COURT LITIGATION TO APPEAL AND CONCLUSIVELY DETERMINE APPLICABILITY OF STATE-ACTION IMMUNITY UNDERMINES IMMUNITY'S PURPOSE AND HAS NEGATIVE CONSEQUENCES FOR THE PUBLIC 10

A. Requiring participation through trial on all antitrust claims before review of state-action immunity denials undermines the doctrine's purpose of resolving conflicts between federalism and antitrust principles 11

TABLE OF CONTENTS – Continued

Page

B. Delay will have negative consequences for public power utilities, and the public 13

C. The status quo – with some circuits allowing immediate appeal of state-action immunity questions and others not – undermines federal uniformity 17

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 536 F.3d 68 (1st Cir. 2008) 14

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 13, 14, 16

Cmty. Commc'ns Co. v. City of Boulder, Colo., 455 U.S. 40 (1982) 4, 11, 12

Commuter Transp. Sys., Inc. v. Hillsborough Cty. Aviation Auth., 801 F.2d 1286 (11th Cir. 1986) 17

F.T.C. v. Phoebe Putney Health Sys., Inc., 568 U.S. 216 (2013) 5

Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563 (6th Cir. 1986) 17

Johnson v. Princeton Public Utilities Commission, 899 N.W.2d 860 (Minn. Ct. App. 2017) 15

Martin v. Mem'l Hosp. at Gulfport, 86 F.3d 1391 (5th Cir. 1996) 12, 17

N.C. State Bd. of Dental Examiners v. F.T.C., 135 S. Ct. 1101 (2015) ..... *passim*

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TABLE OF AUTHORITIES – Continued

Page

Pac. Gas & Elec. Co. v. Sacramento Mun. Util. Dist., 92 F.2d 365 (9th Cir. 1937) 6

Parker v. Brown, 317 U.S. 341 (1943) 4, 6

S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985) 11

S.C. State Bd. of Dentistry v. F.T.C., 455 F.3d 436 (4th Cir. 2006) 17

SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist., 859 F.3d 720 (9th Cir. 2017) 17

State v. City of Austin, 331 S.W.2d 737 (Tex. 1960) 8, 9

STATUTES

16 U.S.C. § 824(a) 8

Sherman Antitrust Act 4, 6

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TABLE OF AUTHORITIES – Continued

Page

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Page

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William J. Hausman & John L. Neufeld, *How Politics, Economics, & Institutions Shaped Electric Utility Regulation in The United States: 1879-2009*, 53 Bus. Hist. 723 (2011) 6

William Kolasky, *Antitrust Litigation: What's Changed in Twenty-Five Years*, 27 Antitrust (Fall 2012) 14

INTEREST OF *AMICI CURIAE*[1]

The American Public Power Association ("APPA") is the service organization representing the interests of not-for-profit, public power utilities throughout the United States. More than 2,000 public power utilities, doing business in every state except Hawaii, provide electric service to approximately 49 million consumers, or about 15 percent of the nation's electric customers.

The Large Public Power Council ("LPPC") is an organization of 26 of the nation's largest public power systems.[2] The member utilities are locally governed and directly accountable to consumers. They provide electricity across 12 states, from Washington State to Florida, and from Arizona to New York, as well as the island of Puerto Rico. LPPC member utilities provide low-cost power to more than 30 million people – about 10 percent of the U.S. population. Collectively, LPPC member utilities own and operate more than 71,000 megawatts of generation capacity and over 30,000 circuit miles of high-voltage transmission lines.

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[1] Pursuant to Rule 37.6, APPA and LPPC ("*amici*") affirm that no counsel for a party authored this brief in whole or in part and that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of *amici*'s intention to file this brief. The parties have consented to the filing of this brief, each in a separate writing that is being filed concurrently with this brief.

[2] Each LPPC member is also a member of APPA.

APPA, LPPC, and their members have a strong interest in preserving state-action immunity as it has been interpreted for decades. APPA and LPPC represent not-for-profit, public power utilities. These entities are either departments of city or town governments, or are special purpose governmental entities. They provide power, water, and many other services to millions of Americans. They serve public goals set forth by the states in which they operate. In the areas served by public power utilities, states have decided to displace a for-profit competitive marketplace that federal antitrust laws are designed to regulate and instead to provide low-cost, reliable, and essential services to citizens through these governmental entities. They are run by elected or appointed public servants.

State-action immunity respects the decision of sovereign states to delegate to these entities the power to operate free of the burden of antitrust laws. Ensuring that public power utilities can immediately appeal an adverse decision on state-action immunity helps protect these entities' ability to provide low-cost utility services without disruption, and insulates their public leaders' discretion to make reasonable policy decisions and avoid the costs and distractions of protracted litigation.

SUMMARY OF THE ARGUMENT

APPA and LPPC urge the Court to grant the petition for certiorari because it presents a question

that is important to their members and the communities that their members serve. The question – when a decision withholding state-action immunity may be appealed – directly impacts APPA and LPPC members and will indirectly affect the public by virtue of the unique role that APPA and LPPC members play in the community.

APPA and LPPC members (also referred to as "public power utilities") are governmental entities that provide power and other public services to 49 million Americans – services that are essential to everyday life. They also advance other goals that distinguish them from for-profit entities. In light of those public objectives, it is critical for APPA and LPPC members to be able to appeal an adverse decision on state-action immunity right away, and not wait until after a trial can be conducted and the district court's judgment on the merits can be issued.

Treating state-action immunity as an immunity from suit respects the sovereignty of state governments, which have delegated authority to public power utilities to administer important services. It also avoids negative practical consequences, such as unnecessary and significant litigation costs for our members, and a deleterious effect on our members' public-servant leaders. Forcing public power utilities to litigate antitrust claims before appellate review of adverse decisions on state-action immunity will undermine the purpose of the doctrine and hamper public power utilities' ability to meet their public objectives. This

case thus presents important issues that this Court should address. The Court should grant the petition.

ARGUMENT

I. STATE-ACTION IMMUNITY IS CRITICAL TO PUBLIC POWER UTILITIES' ABILITY TO FOCUS ON THEIR PUBLIC OBJECTIVES.

State-action immunity allows states to favor public objectives over free-market competition. This Court established the doctrine of state-action immunity in *Parker v. Brown*, 317 U.S. 341 (1943), holding that federal antitrust law – specifically the Sherman Antitrust Act – does not bar states from engaging in allegedly anti-competitive conduct "as an act of government." *Id.* at 352. This doctrine arises out of "the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Cmty. Commc'ns Co. v. City of Boulder, Colo.*, 455 U.S. 40, 53 (1982). The doctrine allows states, in certain "spheres," to "impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives." *N.C. State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101, 1109 (2015). In recognizing the doctrine, this Court acknowledged the impossibility of forcing states to conform each of their laws and policies "to the mandates of the Sherman Act," noting that doing so would "impose an impermissible burden on the States' power to regulate." *Id.* This doctrine applies not just to states

themselves, but to local governmental entities when they "act[] pursuant to a clearly articulated and affirmatively expressed state policy to displace competition." *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 219 (2013).

Nowhere is this doctrine's aim to "achieve public objectives," *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1109, more relevant than in the work of public power utilities. Indeed, the question of whether state-action immunity bars suit and the timing of appellate review is crucial to APPA and LPPC members – and the communities they serve – because of their public purpose and the vast public services they provide.

A. Public power utilities are governmental entities that serve a public purpose.

State-action immunity allows public power utilities to focus their energy on "public objectives," *id.*, and APPA and LPPC members have many. APPA members are public power utilities, varying in size from large providers – such as the Los Angeles Department of Water & Power in Los Angeles, California – to small entities – like Madison Electric in Madison, Maine. Our Members, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/our-members. Twenty-six of the largest public power systems make up the membership of LPPC. Our Members, Large Pub. Power Council (2017), http://www.lppc.org/who-we-are/our-members. The public power utilities that are members of APPA and LPPC are either departments of city or town

governments, or are special purpose governmental entities created under state or municipal law to provide utility services. Public Power, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/public-power ("Like public schools and libraries, public power utilities are owned by the community and run as a division of local government.").

By their very nature, these governmental entities serve public objectives distinct from the profit-maximizing aims of the private entities the antitrust laws were meant to regulate. *See Parker*, 317 U.S. at 351 (noting that the purpose of the Sherman Antitrust Act "was to suppress combinations to restrain competition and attempts to monopolize by *individuals and corporations*" (emphasis added)). Historically, public power utilities were developed not to maximize profits or concern themselves with competition, but to provide electricity service[3] to people who needed it. Public power systems aimed to expand electrification to rural areas in particular, a region of the country that private, for-profit utilities left unserved. William J. Hausman & John L. Neufeld, *How Politics, Economics, & Institutions Shaped Electric Utility Regulation in The United States: 1879-2009*, 53 Bus. Hist. 723, 726, 733 (2011).

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[3] In places like California and Arizona, some public power utilities started by offering water, and only later offered electricity. *See Pac. Gas & Elec. Co. v. Sacramento Mun. Util. Dist.*, 92 F.2d 365, 368 (9th Cir. 1937) (noting that public utilities providing electricity had "become as interwoven in the lives of California men and women as . . . the function of supplying them with domestic water").

The public-oriented nature of these governmental utilities is borne out in how they use their revenue. Because public power utilities do not have shareholders, none of the utility revenues need to be devoted to paying dividends or otherwise distributing profit to equity investors. As a result, the cost-based rates charged by public power utilities are often lower than those charged by investor-owned utilities. Public Power, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/public-power ("Homes powered by public power utilities pay nearly 15 percent less than homes powered by private utilities."). Moreover, public power utilities often make important contributions to other governmental functions in their communities. In 2014, for example, public power utilities "contributed 5.6 percent of [their] electric operating revenues back to the communities they serve." Public Power Pays Back at 3, Am. Pub. Power Ass'n (Apr. 2016) (hereinafter Public Power Pays Back), http://appanet.files.cms-plus.com//PDFs/PublicPowerPaysBack2014.pdf. This revenue contribution comes in a variety of forms, from discounted services, to general payments to the local government, to taxes. Examples of how public power utilities use this revenue for the public good include additional streetlighting; lighting for municipal buildings; traffic signals; and recreational facilities. *Id.* at 7-8.

B. Public power utilities provide a broad swath of public services.

Not only do public power utilities – at a general level – embody the state-articulated "public objectives" that state-action immunity is meant to protect, *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1109, they also provide a broad swath of critical services to which the public should have stable and reliable access. Different from the products and services that make up most of what American private industry offers, utility services are uniquely essential to everyday life and are, consequently, "affected with a public interest." 16 U.S.C. § 824(a) (stating, in Section 201 of the Federal Power Act, the public nature of electricity services); *see also State v. City of Austin*, 331 S.W.2d 737, 745 (Tex. 1960) ("Utilities are necessary adjuncts of the public welfare. Their business operations and their property have long been subject to special legislative treatment for many years." (internal quotation marks omitted)).

These services include electricity and water, first and foremost. For example, a full 49 million Americans – some 1 in 7 American electricity customers – receive their power from public power utilities. And just a single LPPC/APPA member – the Los Angeles Department of Water & Power – provides water to over 4 million people, through 681,000 active service connections. Water: Facts & Figures, L.A. Dep't of Water & Power, https://www.ladwp.com/ladwp/faces/ladwp/aboutus/a-water/a-w-factandfigures?_adf.ctrl-state=1br8pflntd_4&_afrLoop=1054280876754233 (last visited Oct. 5, 2017).

These utilities are "essential to the protection of [the public's] health and safety." *City of Austin*, 331 S.W.2d at 745. As recent natural disasters have demonstrated, without access to dependable electricity and clean water, communities struggle.

But public power utilities also provide services across the country far beyond electricity and water. Additional services may include sewer; wastewater; trash removal; street lighting; street maintenance; gas; and broadband. Owatonna Public Utilities in Minnesota, for example, provides sewer, gas, and streetlighting, in addition to electricity and water. Owatonna Pub. Utils., http://www.owatonnautilities.com/ (last visited Oct. 5, 2017). The Coldwater Board of Public Utilities in Michigan provides electricity, water, sewer, wastewater, and broadband services (including cable, internet, and phone). Our Services, Coldwater Board of Pub. Utils., http://www.coldwater.org/415/Our-Services (last visited Oct. 5, 2017). Hastings Utilities in Nebraska offers electricity, water, natural gas, sewer, and conducts maintenance on street lighting. Rates, Hastings Utils., https://www.hastingsutilities.com/rates/ (last visited Oct. 5, 2017). Idaho Falls Power offers a wide range of services, including electricity, water, trash removal/sanitation, and wastewater. Stop, Start, Move Service, Idaho Falls Power, https://www.idahofallsidaho.gov/268/Stop-Start-Move-Service (last visited Oct. 5, 2017). Bowling Green Municipal Utilities in Ohio even installs and maintains security lights on existing utility poles for a small monthly fee. Products & Services, Bowling Green Mun. Utils., http://bgmu.com/residential/

t/services-offered (last visited Oct. 5, 2017). Either state government, or the public power utilities themselves – and not the whims of investor demand – determines the services these entities provide to citizens.

State-action immunity's aim of allowing government to engage in allegedly anti-competitive conduct to advance public objectives, *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1109, aligns with states' authorization of public power entities to provide these essential services. In many parts of the country, where potential profit did not warrant private industry offering these services, state and municipal governments have acted to ensure that these services are available. State-action immunity protects those decisions from undue intervention under the banner of federal antitrust litigation.

II. WAITING UNTIL THE END OF TRIAL COURT LITIGATION TO APPEAL AND CONCLUSIVELY DETERMINE APPLICABILITY OF STATE-ACTION IMMUNITY UNDERMINES IMMUNITY'S PURPOSE AND HAS NEGATIVE CONSEQUENCES FOR THE PUBLIC.

State-action immunity must be resolved at the outset of litigation. Requiring parties like members of APPA and LPPC to participate in discovery and full-blown trials on antitrust claims before resolving state-action immunity questions will undermine the doctrine's purpose and cause negative consequences for public power utilities and the communities they serve.

And leaving the status quo – with some circuits allowing immediate appeal of state-action immunity decisions and others first requiring litigation through trial – will lead to variation based solely upon the boundaries of the federal appellate circuits.

A. Requiring participation through trial on all antitrust claims before review of state-action immunity denials undermines the doctrine's purpose of resolving conflicts between federalism and antitrust principles.

State-action immunity's purpose is to "resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace." *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 61 (1985). The doctrine respects the "significant measure of sovereignty" afforded states "under our Constitution." *Cmty. Commc'ns Co.*, 455 U.S. at 53. If APPA and LPPC members – which have been created by sovereign states and delegated authority to provide public services – are forced to litigate entire cases before being able to appeal an adverse decision regarding state-action immunity, then the doctrine's goal of acknowledging and respecting state sovereignty is not being met.

In the case of public power utilities, states have made an important choice. Rather than take on the significant burden of interceding in the utility market directly or attempting to achieve public goals by

influencing the behavior of for-profit private enterprises, they have delegated authority to political subdivisions to achieve those public goals by providing utility services. Across the country, hundreds of APPA and LPPC members exercise delegated state authority to administer services that are essential to daily human life. States have made this type of delegation to ensure these services are provided in a stable and reliable manner, at a reasonable cost, especially where private providers may not be inclined to serve.

This choice on the part of states demands respect under our dual system of governance, and under the state-action immunity doctrine that is designed to respect state sovereignty. *Cmty. Commc'ns Co.*, 455 U.S. at 53. Haling public power utilities into court, and forcing them to litigate complex and expensive antitrust cases for years before they can receive appellate review of a determination that state-action immunity does not apply, affords no such respect. *See Martin v. Mem'l Hosp. at Gulfport*, 86 F.3d 1391, 1395 (5th Cir. 1996) ("One of the primary justifications of state action immunity is the same as that of Eleventh Amendment immunity -- to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." (internal quotation marks omitted)). It undermines a state's choice regarding these essential services, and it effectively neuters the protections state-action immunity is meant to provide.

B. Delay will have negative consequences for public power utilities, and the public.

It also is critical that public power utilities be able to resolve the application of state-action immunity at an early stage in litigation because of the practical impact of doing the opposite. APPA and LPPC members are not-for-profit public entities, which serve as divisions "of local government." Public Power, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/public-power. What little excess revenue they may have is re-directed to their authorizing governmental units, or to their customers in the form of lower-cost services. Public Power Pays Back at 3. For any of the public entities that APPA and LPPC represent, litigation is costly, and will necessarily draw resources away from the public services these entities provide. Roger L. Kemp, Managing America's Cities: A Handbook for Local Government Productivity 102 (2007) (noting the tendency of local governments to settle lawsuits due to the significant cost of continuing litigation through trial, regardless of the legal merits of the case). Forcing these entities to litigate to the end of a case before determining if state-action immunity applies will waste significant resources, and ultimately hurt utility customers.

This is especially true in the context of antitrust litigation. As this Court recognized in *Bell Atlantic Corp. v. Twombly*, "proceeding to antitrust discovery can be expensive." 550 U.S. 544, 558 (2007). In support, this Court cited the discussion of "the unusually high

cost of discovery in antitrust cases" described in William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887, 1898-1899 (2003). *Twombly*, 550 U.S. at 559. Even when dissenting in *Twombly*, Justice Stevens, who arrived at the Court as an authority on antitrust litigation[4] acknowledged that "[p]rivate antitrust litigation can be enormously expensive[.]" *Twombly*, 550 U.S. at 573 (Stevens, J., dissenting); *see also Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers*, 536 F.3d 68, 77 n.7 (1st Cir. 2008) ("[A]ntitrust suits ordinarily entail massive discovery and are expensive to defend."). Antitrust litigation is routinely cited as one of the most complex and expensive types of litigation in the United States. *See* Manual for Complex Litigation, Fourth § 30, p. 519 (2004) (cited in *Twombly*, 550 U.S. at 559); William Kolasky, *Antitrust Litigation: What's Changed in Twenty-Five Years*, 27 Antitrust (Fall 2012) (noting the increasingly burdensome costs of e-discovery in antitrust litigation). This fact exacerbates the problem of forcing public power utilities to reach the end of trial court litigation before determining if an important protection could have saved them from suit in the first instance.

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[4] "Justice Stevens was a prominent antitrust practitioner, lecturer and author before he was even Justice Stevens." Robert A. Skitol and Kennedy M. Vorrasi, *Justice Stevens' Antitrust Legacy*, 24 Antitrust No. 3 at 33 (Summer 2010).

The burden of litigating an entire case would be especially acute and overwhelming for the many APPA members that are small organizations providing services to small cities and towns. Hundreds of APPA members provide power and other services to small communities, yet nevertheless face the specter of antitrust litigation like this case. Public Power, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/publicpower ("Most public power utilities have fewer than 4,000 customers. . . ."). The difference between litigating to the end of a case at the trial court level, versus appealing immediately to obtain the protection of state-action immunity, could have an especially significant impact on small APPA members and the customers and communities they serve.

The burden of litigating to the end of a case also could discourage public service in the governance and management of APPA and LPPC members. Some public power utilities have elected leaders, such as the municipal utility district in *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193, 196 (2009), while the leaders of others are appointed by elected officials, such as the natural gas utility district in *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 605 (1971), and the municipally-owned utility in *Johnson v. Princeton Public Utilities Commission*, 899 N.W.2d 860, 867 (Minn. Ct. App. 2017); *see also* 2015 Governance Survey at 1-2, Am. Pub. Power Ass'n (May 2015), https://www.csu.org/CSUDocuments/appagovernancesurvey2015.pdf (noting that a majority of surveyed public power utilities

are governed by elected city councils, and that the remainder are governed by independent boards, which can be either elected or appointed). The threat of lengthy and protracted antitrust litigation, without the possibility of appealing regarding the protection of state-action immunity until after the end of trial, could deter public servants from leading public power utilities.

Even for those that are not deterred from serving, the weight and distraction of lengthy antitrust litigation will, at a minimum, impact the policy-making decisions of public power utilities' leaders. As the article on antitrust litigation cited by this Court in *Twombly* explains, "[a]necdotal evidence suggests that defendants unable to shift the costs of complying with requests for electronic documents feel pressured to settle lawsuits to avoid the discovery costs." Wagener, *supra*, at 1898. Instead of exercising the discretion and authority delegated to them by the relevant state, and providing services in a way that achieves public goals, public power-utility leaders may make defensive decisions that protect against the added burdens of antitrust litigation.

Finally, the costs of protracted antitrust litigation will be borne by the citizen-customers public power utilities serve. With private utilities, shareholders may bear the cost of litigation through reduced profits. Public power utilities have no shareholders; all of the costs of litigation will ultimately be shouldered by the citizen-customers they serve, whether through the rates they pay, reduced services, or both.

C. The status quo – with some circuits allowing immediate appeal of state-action immunity questions and others not – undermines federal uniformity.

The current state of the law on this question leaves public power utilities held to different standards across the country. APPA and LPPC members in the Fifth and Eleventh Circuits may appeal state-action immunity questions immediately. *Martin*, 86 F.3d at 1395-97; *Commuter Transp. Sys., Inc. v. Hillsborough Cty. Aviation Auth.*, 801 F.2d 1286, 1289-90 (11th Cir. 1986). Members in the Fourth, Sixth, and now Ninth Circuits cannot. *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720, 725-27 (9th Cir. 2017); *S.C. State Bd. of Dentistry v. F.T.C.*, 455 F.3d 436, 441-47 (4th Cir. 2006); *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563, 567-68 (6th Cir. 1986). This means some utilities across the country will have state-action immunity resolved before expending time, resources, and energy in trial litigation and others will not. These differences will have a direct but disparate impact on the communities that each of the members serve across the country. This Court should clarify the state of the law.

CONCLUSION

The practical impact of putting off appeal of a state-action immunity denial until the end of trial court litigation will be to impose the risk of massive

litigation costs on public power entities, with the potential to deter and distract their leaders. Public power utilities are governmental entities that serve important public purposes, and provide countless valuable services to the communities that they serve. The issues that this case presents are important enough that the Court should grant the petition and consider this case.

Respectfully submitted,

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